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NO. 80-918

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ALLEN R. TRUE, CYNTHIA F. TRUE, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY MEMORANDUM ON CERTIORARI

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As he did in the court below, the Commissioner urges a very limited and technical restriction of what cases, even final cases, may be appealed from the Tax Court to the courts of appeal. He cites on page 2 a supposed seamless web of opinions said to uniformly support the

proposition that only cases "that determine the amount of a deficiency, or that, by statute, are considered to be such decisions" are reviewable by the courts of appeal. This position is one from which the Commissioner himself has found deviation necessary from time to time. Two of those instances involved cases cited in his memorandum, page 2.

In *Commissioner v. Smith Paper, Inc.*, 222 F.2d 126 (1st Cir. 1955), and *Commissioner v. S. Frieder & Sons Co.*, 228 F.2d 478 (3d Cir. 1955), the Commissioner sought review from the First and Third Circuits, respectively, of Tax Court orders striking an amended answer of the Commissioner which sought to redetermine excess profits tax liabilities. The First Circuit then agreed with the Commissioner's present position that it could only hear appeals of a "decision" as defined by the statute. On the other hand, the Third

Circuit, in *Frieder*, held that the order was analogous to a Tax Court order dismissing a taxpayer's petition challenging a deficiency claim and, therefore, found it to be appealable. *Frieder*, then, disagrees with the position now espoused by the Commissioner to oppose a taxpayer's appeal.

In two other respects, the law is neither as uniform nor as supportive of the Government's position as it would have this Court believe.

As noted in the Petition, page 13, this Court in *United States v. California Eastern Line*, 348 U.S. 351 (1955), held in certain war profit renegotiation situations that Tax Court orders, other than actual determinations of deficiencies, were reviewable in the courts of appeal. That case thus superseded two of those cases cited by the Government on page 2: *Ceco Steel Products Corp. v. Commissioner*,

150 F.2d 698 (8th Cir. 1945), and *Kiker v. Commissioner*, 218 F.2d 389 (4th Cir. 1955).

Three other cases among those on page 2,[1] in fact, do recognize that the determining question is not whether the decision from which review is sought is a "decision" under the "date of decision" or "determination of deficiency" theories espoused by the Commissioner but, rather, whether the decision is "final", either totally or under the *Cohen*[2] doctrine.

There is a conflict between cases like *Licavoli*,[3] *Louisville Builders*,[4] and

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1 Licavoli v. Commissioner, 318 F.2d 281 (6th Cir. 1963); Porter v. Commissioner, 453 F.2d 1231 (5th Cir. 1972); Ryan v. Commissioner, 517 F.2d 13 (7th Cir. 1975).

2 Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949).

3 Supra, Note 1.

4 Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333 (6th Cir. 1961).

Ryan,[5] which recognize the *Cohen* doctrine, either expressly or implicitly do so by applying its principles; and those that do not. It cannot be ignored simply by discussing *Louisville* in a footnote and arguing it as a "spotted dog" case with unique facts. Similarly, the fact that several circuits have accepted the applicability of the *Cohen* doctrine in determining the appealability of Tax Court cases cannot be obviated by contending in a footnote (page 4) that, because they did not hold orders appealable under *Cohen*, those circuits rejected the *Cohen* doctrine for Tax Court cases. It does mean that not every claim to appealability under *Cohen* will be accepted, an approach which is consistent with the cautionary teachings of this Court in *Cohen* cases. But the Ninth Circuit refused to even measure

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[5] Supra, Note 1.

this order, and the collateral prejudice to the Petitioner which was urged as the reason for its appealability, against the standards of *Cohen*.[6]

The Government's view of the scope of review of Tax Court orders has evoked both uncertainty and extreme results. It has resulted in the Tenth Circuit concluding that a Tax Court order, which refused to enforce an earlier mandate of the Tenth Circuit, simply was not appealable. *Whitlock v. Commissioner*, 547 F.2d 506 (10th Cir. 1976). It has evoked inconsistent results, based upon tortuous

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[6] The Government's cavalier assertion, page 4, that in any event this order would not be appealable under Cohen not only overlooks the severe prejudice to Petitioner of pitting brother against brother, thereby causing loss of right to determine deductibility of certain payments, it is beyond the scope of this Petition. We ask the Court simply to order the Ninth Circuit to consider the appealability of this order under Cohen or related principles of finality; we are not asking that this Court, in fact, weigh the appealability of this case under Cohen.

comparisons to "analogous orders" in the *Smith Paper* and *S. Frieder & Sons Co.* cases, *supra*, page 2. It has relegated the review of an order to take a deposition, which clearly exceeded the jurisdiction of the Tax Court, as some kind of *sui generis* exception to the general rule of nonappealability. And, necessarily, the litigation of such ad hoc exceptions to general rules, sometimes by the Government to suit its needs, obviously encourages more attempts to appeal various kinds of Tax Court orders.

This Court ought to express, clearly, the appropriate rule. Either Tax Court orders are appealable if "final", including the collateral final order doctrine, or they are to be limited as the Government now requests. If the former, an extensive body of case law on finality will be available to aid the courts of appeal and to guide counsel whether to

appeal or not. If the latter, the rule is clear (although unworkable, even for the Government). We submit that a summary decision would be appropriate for this Court to settle the conflicting cases on the subject.

February 1981.

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